86-599

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MARSHALL SPIEGEL

Petitioner

v.

CONTINENTAL ILLINOIS NATIONAL BANK, ROBERT PAULSEN, SAMUEL HUNT, CHARLES R. HALL, and EDWARD BOTTUM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the revelation at the federal criminal trial of a state court judge that at the time a dispute between petitioner and respondent Bank was pending before him, the judge obtained a large, unsecured loan at a favorable interest rate from respondent Bank require a reassessment of whether correspondence between counsel about litigation which had been pending before the former judge constituted a fraudulent use of the mails?

2. When an appeal is taken in a case described by the district court as one of "first impression," and where, because of the complexity of the issues and its potential financial exposure, an experienced consumer of legal services is willing to pay its attorneys to work more than 200 hours to prepare an appellate brief,

   i. Does Rule 38 of the Federal Rules of Appellate Procedure authorize a court of appeals to conclude that such an appeal is "frivolous?"

   ii. Should an award of attorneys' fees under F.R.A.P. 38 provide compensation for all work that was actually performed when the work performed far exceeds that which should have been required to defend against a frivolous appeal, and should the award be imposed against the litigant or his counsel?

   iii. Does Rule 27(c) of the Federal rules of Appellate Procedure authorize a single judge of a court of appeals to determine the amount of attorneys' fees due as F.R.A.P. 38 "damages for delay"?

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No. 86-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MARSHALL SPIEGEL

Petitioner

v.

CONTINENTAL ILLINOIS NATIONAL BANK, ROBERT PAULSEN, SAMUEL HUNT, CHARLES R. HALL, and EDWARD BOTTUM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 13, 1986, as well as the subsequent orders entered by a single judge of the court of appeals a) awarding fees in the amount of $30,518.51 as a F.R.A.P. 38 sanction for having prosecuted a "frivolous appeal" and b) refusing petitioner's request for reconsideration under F.R.A.P. 27(c) by a three judge panel of the fee determination.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-25) is reported at 790 F.2d 638 (7th Cir. 1986). The orders of a single judge of the Court of Appeals setting the amount of attorney's fees (App. 30-31) and refusing to permit reconsideration under F.R.A.P. 27(c) by a three judge panel (App. 32) are unreported. The decision of the district court (App. 33-48) is reported at 609 F.Supp. 1083 (N.D.Ill. 1985).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 27) was entered on May 13, 1986; petitioner's timely petition for rehearing was denied by the court of appeals without opinion on June 11, 1986. (App. 27.) On August 17, 1986, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including October 9, 1986.

RULES INVOLVED

This case involves Rule 38 of the Federal Rules of Appellate Procedure which provides as follows:

> **Damages for Delay.** If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

This case also involves Rule 27(c) of the Federal Rules of Appellate Procedure which provides as follows:

> **(c) Power of a Single Judge to Entertain Motions.** In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any

request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

STATEMENT OF THE CASE

Petitioner, the beneficiary of a trust, sought to maintain an action under 18 U.S.C. §1964 to recover damages he had sustained as the result of an alleged pattern of racketeering activity by respondent Continental Bank in its management of trust assets.[1] The district court twice described the case as one "of first impression" not controlled by direct precedent (App. 39, 45), rejected the Bank's argument that the action was barred by prior litigation between the parties,[2] (App. 39), but concluded that plaintiff had failed to allege more than a single act of mail fraud. (App. 48.)

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1. Petitioner's complaint arises from the Bank's use of the mails to conceal its former practice of converting trust income to its own benefit by refusing to credit trust income to principle other than on a quarterly basis. (App. 35.)

2. Plaintiff's initial attempt to bring a RICO action against the Bank was dismissed for want of jurisdiction. *Spiegel v. Continental Illinois National Bank*, No. 83 C 4152 N.D.Ill. (January 5, 1984). Plaintiff did not appeal from this order.

The district court concluded that petitioner's allegations concerning the Bank's use of the mails to cover-up its practice of using trust income to its own benefit was sufficient to allege a use of the mails to defraud. (App. 36.) In the view of the district court, however, other mailings identified by petitioner did not, as a matter of law, involve mail fraud because the letters involved

> correspondence between attorneys, dealing at arm's length on behalf of their parties, concerning an issue in pending litigation, especially where the presiding judge is aware of the alleged scheme and will ultimately rule on the acts in question. (App. 45.)

On appeal, a panel of the Seventh Circuit upheld the district court's rejection of the Bank's *res judicata* defense (App. 15-16), and did not reach the question of whether correspondence between attorneys was within the scope of the mail fraud statute. (App. 23 n.11.) The court of appeals affirmed on the ground that the letters had not been mailed in furtherance of any scheme to defraud, primarily because the

> state trial judge had ample opportunity to protect the plaintiff's interests in the trust assets and possessed the power to order Continental to return the funds it deducted . . . Since the Cook County Circuit Court was in a position to resolve Continental's alleged fees due from the trust assets and because these two letters fully advised Spiegel's counsel of Continental's deduction of funds from the trust and clearly set forth its reasoning for deducting the funds, we conclude that Spiegel's allegation that this was a "scheme" to deceive Spiegel of trust assets is without merit. (App. 21.)

The court of appeals also found that the appeal was frivolous (App. 24) and concluded that "appellant's conduct in pursuing this senseless litigation was an attempt to harass

the defendants." (App. 25.) On these two findings, the panel awarded the Bank double costs and attorney's fees for defending the appeal. Id.

Shortly after the panel filed its opinion, the state court judge who had "had ample opportunity to protect the plaintiff's interests in the trust assets and possessed the power to order Continental to return the funds it deducted" (App. 21) was sentenced upon his conviction of a variety of federal offenses including extortion (involving the receipt of loans from parties in cases pending before him), mail fraud, RICO, and tax evasion. *United States v. Holzer*, No. 85 CR 287 (N.D.Ill.). Among the facts revealed at the former judge's trial was that in addition to owning stock in respondent Bank, the former state court judge had obtained an unsecured loan (at a favorable interest rate) from the Bank when petitioner's trust dispute was pending before him.

In a timely petition for rehearing,[3] petitioner urged that the revelations of favorable loans at the criminal trial of the former state court judge required a remand to permit an expansion of the record. In addition, petitioner argued that the panel's finding of frivolity was inappropriate in a case which the district court had described as presenting a question of "first impression." Petitioner also argued that any award of fees for having prosecuted a frivolous appeal should be assessed against his former attorney. Rehearing was

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3. Petitioner secured new counsel after the appeal had been affirmed and found to be frivolous.

denied without opinion. (App. 26.)

During the pendency of the petition for rehearing, respondents filed their "Statement of Time and Expenses" and disclosed that respondents had incurred attorneys' fees in excess of thirty thousand dollars in defending the appeal. Petitioner opposed the requested fee award of $30,518.51, arguing that this amount of work was excessive and unreasonable.[4]

The court of appeals initially expressed a willingness to consider the response to the fee petition as a second petition for rehearing (App. 28-29), but subsequently vacated that order without explanation and awarded fees in the full amount sought. (App. 30-31.) Thereafter, petitioner requested that the single judge order fixing the amount of fees be reviewed by the panel pursuant to Rule 27(c) of the Federal Rules of Appellate Procedure. This motion was denied by a single judge of the court of appeals without explanation. (App. 32.)

REASONS FOR GRANTING THE WRIT

Review in this case is required to insure that Rule 38 of the Federal Rules of Appellate Procedures does not become a vehicle to close the court house door to appellate review of decisions which, as here, present what the district court correctly described as "a case of first impression."[5] (App.

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4. Petitioner asserted in the court of appeals that if the appeal had been truly frivolous, no more than ten hours of work would have been required to prepare and to file appellee's answering brief.

5. Review is also appropriate because the decision of a single judge of the Seventh Circuit to award more than $30,000 as attorneys' fees for the preparation of the appellee's brief in an appeal deemed to be frivolous is such a vast departure from the accepted and ordinary procedure as to warrant review by the Court, especially when the

45.) Review is especially appropriate because revelations at the successful federal prosecution of the state court judge whom the court of appeals believed had "ample opportunity to protect the plaintiff's interests" (App. 21) suggest that petitioner's claims are far from frivolous.

-A-

Aside from cases where an appeal is taken after a district court's finding of frivolity,[6] or cases where the issues raised on appeal have been held in other litigation to be "patently frivolous," "preposterous and nearly silly," "baseless," or "ludicrous"[7] the courts of appeals have not adopted a uniform standard for determining when the imposition of sanctions is appropriate under F.R.A.P. 38.

The majority of the courts of appeal are "reluctant to classify as frivolous colorable arguments on appeal even when we have found them to be without merit." *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986). This is the rule even when an appellant "challenged with little hope of succeeding a well-settled [circuit] rule," *In re Kenitra, Inc.*, 797 F.2d 790, 791 (9th Cir. 1986). See, e.g., *McIntyre v. K-Mart Corp.*, 794 F.2d 1023, 1026 (5th Cir. 1986); *Wilson v. Lambert*, 789 F.2d 656, 659 (8th Cir. 1986); *Hustler Magazine Inc. v. Moral Majority Inc.*, 796 F.2d

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single judge refuses to permit reconsideration of the magnitude of the fee award by a three judge panel pursuant to Rule 27(c) of the Federal Rules of Appellate Procedure.

6. See, e.g., *Gipson v. Rosenberg*, 797 F.2d 224, 226 (5th Cir. 1986); *Hilgeford v. Peoples Bank*, 776 F.2d 176, 179 (7th Cir. 1985); *Fox v. Boucher*, 794 F.2d 34 (2d Cir. 1986);

7. *Mathes v. C.I.R.*, 788 F.2d 33, 35 (D.C. Cir. 1986).

1148, 1156 (9th Cir. 1986).

A different rule is applied in the Seventh Circuit[8] where rules permitting sanctions are enforced "to the hilt." *Dreis & Krump Manufacturing Company v. International Association of Machinists,* ___ F.2d ___ (7th Cir., No. 85-3136, September 22, 1986.)[9] As applied in the present case, the Seventh Circuit's rule permits the imposition of sanctions even when the district court has found the case to be one of "first impression" (App. 45), or where respondents' counsel, in securing an extension of time to file its brief, had described the appeal as "sufficiently complex" because it involved "the briefing of an issue of apparent first impression involving the scope of the mail fraud statute as it relates to correspondence between attorneys in the context of pending litigation."[10] Finally, the court of appeals did not find any reason to reconsider its finding that the appeal was frivolous when it learned that respondent Bank — perhaps the archetypal experienced consumer of legal services — had been willing to pay its lawyers more than $30,000 to defend the appeal.

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8. At one time, the rule in the Seventh Circuit was that a "frivolous appeal means something more to us than an unsuccessful appeal." *N.L.R.B. v. Lucy Ellen Candy Division,* 517 F.2d 551, 555 (7th Cir. 1975).

9. In *Dreis, supra,* the Seventh Circuit held *inter alia* that the district court had abused its discretion in *refusing* to impose sanctions and remanded the case "for an award of the attorney's fees reasonably incurred by the union both in the district court and in this court." (slip op. 15.)

10. Affidavit of Kevin C. Aiston, Esq., appended to Appellee's Motion for Extension of Time, 7th Cir., No. 85-1871, August 5, 1985.

-B-

That respondent Bank paid its attorneys more than $30,000 to defend the appeal is strong evidence that the appeal was non-frivolous in the conventional sense, i.e., that the appeal was not "devoid of merit and unsubstantial either because concluded by previous authority or because of its absolutely frivolous nature." *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 107 (1912).

There is some authority, however, for the proposition that irrespective of the frivolity of an appeal, F.R.A.P. 38 permits the imposition of sanctions when the appellant's brief does not set out a basis for reversal of the district court's decision. (App. 24.) The court of appeals held that petitioner's brief failed "to clearly and cogently present arguments for overturning the district court decision." (Id.) Insofar as the decision of the court of appeals to award fees rests upon this finding, the question presented is whether an award of attorney's fees under F.R.A.P. 38 should provide compensation for all work actually performed when the work performed far exceeds that which should have been required to defend against a frivolous appeal.[11]

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11. Petitioner opposed the use of "market rates" to determine fees and argued in the court below that the fees awarded "should not exceed the Rule 38 damages awarded by the Court in other appeals deemed to have been frivolous," citing three decisions of the Seventh Circuit awarding fees ranging from $500 to $2500. *Hilgeford v. Peoples Bank*, 776 F.2d 176, 179 (7th Cir. 1985) ($500); *State of Wisconsin v. Glick*, 782 F.2d 670, 674 (7th Cir. 1986) ($500); *Ruderer v. Fines*, 614 F.2d 1128, 1133 ($2500).

The courts of appeals have not adopted a consistent approach to determining whether F.R.A.P. 38 sanctions should include attorney's fees to be computed at market rates or whether Rule 38 sanctions should instead be viewed as a penalty to be determined by the court of appeals in the course of its decision on the merits. The District of Columbia Circuit appears to have endorsed the "market rate" approach.[12] The First Circuit appears to favor either an award of double costs and no fees,[13] or an award of a "penalty amount."[14] The Second Circuit has imposed a "penalty amount" in some cases[15] and remanded to the district court for a determination of reasonable fees in another case.[16] Decisions in other circuits reveal a similar inconsistency.[17]

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12. *Holmes v. District of Columbia*, ___ F.2d ___ (D.C.Cir., No. 85-5005, Sept. 12, 1986); *Mathes v. C.I.R.*, 788 F.2d 33, 34 (D.C. Cir. 1986); *American Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1057 (D.C.Cir. 1986).

13. *Kelly v. U.S.*, 789 F.2d 94, 98 (1st Cir. 1986) (only double costs); *Sullivan v. U.S.*, 788 F.2d 813, 816 (1st Cir. 1986) (only double costs);

14. *Palmes Del Mar Co. v. N.L.R.B.*, 797 F.2d 39 (1st Cir. 1986) ($3000); *Action Mfg., Inc. v. Fairhaven Textile Corp.*, 790 F.2d 164, 167 (1st Cir. 1986) ($2000);

15. *Fox v. Boucher*, 794 F.2d 34, 38 (2d Cir. 1986) ($2500); *Johl v. Johl*, 788 F.2d 75, 76 (3d Cir. 1986) ($200); *Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486, 491 (2d Cir. 1986) ($1000);

16. *United States v. Carley*, 783 F.2d 341, 345 (2d Cir. 1986).

17. Third Circuit: *Franklin Township v. Middlesex County Utilities Authority,*, 787 F.2d 117 (3d Cir. 1986) (costs only); *Sun Ship, Inc., v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986) (amount to be determined by district court);

Fifth Circuit: *George v. City of Patton Village*, ___ F.2d ___ (5th Cir. 1986) (double costs only); *McBoldrick Oil Co. v. Campbell, Athey & Zukowski*, 793 F.2d 649 (5th Cir. 1986) ($3000); *In re Cajun Elec. Power Co-op., Inc.*, 791 F.2d 353, 366 (5th Cir. 1986) (market rates); *George v. State of Texas*, 788 F.2d 1099, 1100-01 (5th Cir. 1986)

In our view, the appropriate rule is that when F.R.A.P. 38 sanctions are imposed because of a failure of appellate advocacy, the appropriate measure of sanctions is a "penalty amount" to be assessed directly against appellate counsel [18]

(remand to determine amount); *Capps v. Eggers*, 782 F.2d 1341 (5th Cir. 1986) (same).

Seventh Circuit: *Margoles v. Johns*,, 798 F.2d 1069 (7th Cir. 1986) ($2500); *Granado v. C.I.R.*, 792 F.2d 91, 94 (7th Cir. 1986) ($1500); *Bacon v. A.F.S.C.M.E.*, 795 F.2d 33, 35 (7th Cir. 1986) (appellate counsel directed to file fee petition);

Eighth Circuit: *Nagy v. Jostens, Inc.*, 787 F.2d 446, 447 (8th Cir. 1986) ($2500);

Ninth Circuit: *Hewitt v. City of Stanton*, 798 F.2d 1230, 1233 (9th Cir. 1986) ($500);

Tenth Circuit: *Stafford v. C.I.R.*, 799 F.2d 641 (10th Cir. 1986) ($500);

Eleventh Circuit: *Stubbs v. C.I.R.*, 797 F.2d 936, 939 (11th Cir. 1986) ($1185); *Pollard v. C.I.R.*, 786 F.2d 1063, 1067 (11th Cir. 1986) (market rates);

18. There is no uniformity in the Seventh Circuit on the question of whether and under what circumstances Rule 38 sanctions should be imposed directly upon appellate counsel or directly upon the party or apportioned between the two. Compare *Indianapolis Colts v. Mayor & City Counsel*, 775 F.2d 177, 184 (7th Cir. 1985) (fees assessed with appellants personally) with *In re TCI, Ltd.*,, 769 F.2d 441 (7th Cir. 1985) (fees assessed against counsel: "The lawyer who proceeds recklessly — not his innocent adversaries — must foot the bill" 769 F.2d at 450.) See, e.g., *Reid v. United States.*, 715 F.2d 1148, 1154 (7th Cir. 1983) (fees assessed against appellate counsel); *Trecker v. Scag*, 747 F.2d 1176, 1179 (7th Cir. 1984) (same); *Lepucki v. Van Wormer*, 765 F.2d 86 (7th Cir. 1985) (same). But see *Thornton v. Wahl*, 787 F.2d 1151 (7th Cir. 1986), where the court of appeals asserted that its ordinary rule as to "impose attorneys' fees on the party, leaving party and lawyer to settle account." Id. at 1154.

The purpose of imposing sanctions because of a failure of appellate advocacy is to punish the transgressor and to deter similar conduct in the future.[19] The appellee — who has won an appeal which, but for the failure of advocacy, it could have lost — has not been harmed and a compensatory sanction (such as an award of attorneys' fees at market rates) is not warranted and is manifestly unfair.

-C-

The court of appeals in this case acted through a single judge in determining that petitioner should pay $30,518.51 as attorney's fees, rather than the lesser sum that petitioner had proposed in response to appellee's statement of time and expenses.[20] An order determining the amount of fees to be paid appears to be the type of final determination which, under Rule 27(c) of the Federal Rules of Appellate Procedure must be made by a panel of the court of appeals.

Even assuming that a single judge of the court of appeals is authorized to make a final determination of the amount of attorneys' fees to be awarded as a Rule 38 sanction, Rule 27(c) of the Federal Rules of Appellate Procedure appears to vest petitioner with a right to have the single judge order reviewed by the court. Petitioner sought to exercise this right; his request for reconsideration by the court was denied by a single judge. (App. 32.) This series of orders is such a vast departure from the accepted and ordinary

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19. It is arguable, of course, that a more appropriate vehicle for this purpose is utilization of the court's power to discipline attorneys who are authorized to appear before it.

20. See note 11 *ante*.

procedure set out in Rule 27(c) of the Federal Rules of Appellate Procedure as to require correction by this Court under its supervisory powers.

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Both the district court (App. 45) and the court of appeals (App. 19) concluded that correspondence between counsel about pending litigation did not constitute a fraudulent use of the mails because petitioner's dispute with respondent Bank was pending before a state court judge who "had ample opportunity to protect [petitioner's] interests in the trust assets." (App. 21.)

During the pendency of petitioner's appeal, the state judge was convicted of a variety of federal offenses including extortion (involving the receipt of loans from parties in cases pending before him), mail fraud, RICO, and tax evasion. *United States v. Holzer*, 85 CR 287, N.D.Ill.

In his petition for rehearing, petitioner called the attention of the court of appeals to several exhibits which had been used at the federal criminal trial which showed that the former state court judge had obtained an unsecured $30,000 loan from respondent Bank at a favorable interest rate at about the time that petitioner's dispute with the Bank was pending before him.[21]

The financial dealings between the former state judge and respondent Bank require that the correspondence

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21. The exhibits consisted of handwritten sheets which had been prepared by former Judge Holzer summarizing his outstanding obligations and his 1984 federal tax return, which shows that Holzer claimed a deduction for interest paid to respondent Bank.

between counsel discussed by the court of appeals (App. 6-7) be viewed in a different light.[22] If respondent Bank had loaned money to the former judge in order to secure a favorable ruling in the Bank's dispute with petitioner, the former judge would have had "a direct, personal, substantial, pecuniary interest in reaching a conclusion against petitioner," *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) and the dealings between the Bank and the former judge would have deprived petitioner of an unbiased forum. *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986). Under these circumstances, the Bank's alleged use of the mails — in addition to making the state judge "aware of the alleged scheme" (App. 45) — involved an unlawful use of the mails because it made discovery of the Bank's alleged wrongdoing less likely and postponed its detection, *United States v. Sampson*, 371 U.S. 75 (1962), and therefore constituted the second predicate act required to establish plaintiff's claim under 18 U.S.C. §1964.

The recently undisclosed dealings between respondent Bank and the former state court judge require that the district court's order granting summary judgment be vacated and the case remanded for consideration of petitioner's claims on an expanded record.

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22. Neither the Bank nor the former state trial judge disclosed this relationship in the course of state court proceedings.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

October, 1986

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1871

MARSHALL C. SPIEGEL, individually and as a representative of a class of persons similarly situated,

Plaintiff-Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK, ROBERT PAULSEN, SAMUEL HUNT, CHARLES R. HALL, EDWARD BOTTUM, and unknown defendants,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 84 C 8255—**Marvin E. Aspen**, *Judge.*

ARGUED DECEMBER 11, 1985—DECIDED MAY 13, 1986

Before BAUER and COFFEY, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* The district court dismissed Marshall C. Spiegel's ("Spiegel") civil RICO action[1] on

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[1] The Racketeering Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq.*, provides a civil remedy of treble damages to "[a]ny person injured in his business or property by reason of a violation of" 18 U.S.C. § 1962. 18 U.S.C. § 1964(c). Section 1962 prohibits, *inter alia*, persons associated with an enterprise involved

(Footnote continued on following page)

the grounds of *res judicata* and for failing to state a claim, Spiegel appealed. We affirm.

I

Marshall Spiegel, the plaintiff-appellant in the present case, filed three separate lawsuits against the defendants-appellees herein, arising out of a dispute over the defendants' management of a trust established by the grantor Oscar Spiegel for the benefit of his son, Marshall. For convenience, we shall refer to Spiegel's initial action filed against the defendants-appellees in the Circuit Court of Cook County, Illinois as the "state court litigation." Spiegel subsequently filed two lawsuits in the United States District Court for the Northern District of Illinois. Spiegel's federal actions shall hereinafter be referred to as "*Spiegel I*" and "*Spiegel II*." The present appeal is from the district court's dismissal of *Spiegel II*.

State Court Litigation

In 1972, Oscar Spiegel, Marshall Spiegel's father, established a trust naming Marshall as the sole income beneficiary[2] and naming an aunt of Marshall's and the Con-

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[1] *continued*
in interstate commerce from conducting the affairs of the enterprise through a "pattern of racketeering activity." To establish a pattern of racketeering activity, the plaintiff must prove the defendant committed at least two predicate acts of racketeering activity within ten years. "Racketeering activity" is defined as any act chargeable under various state criminal laws, and any act which is indictable under various sections of Title 18, including section 1341 relating to mail fraud.

[2] The trust agreement provides:

> "While my son, MARSHALL C. SPIEGEL, is living, the Trustees may use for his benefit so much of the income of his trust as the Trustees determine to be required, in addition to his other income from all sources known to the Trustees, for his reasonable support, comfort and education adding any excess income to the principal at the discretion of the Trustees.
>
> * * *

(Footnote continued on following page)

tinental Illinois National Bank as trustees. Oscar Spiegel died in 1973. The trust agreement provided that Marshall would become a trustee upon reaching the age of 25. Upon turning 25 in 1981, Spiegel, desiring to act as sole trustee, removed his aunt as trustee,[3] and also attempted

[2] *continued*

> . . . [A]fter attaining age forty (40) he may withdraw any part or all of such trust. . . .
>
> Upon the death of my son, MARSHALL, after my death, or if he should die before complete distribution is made to him, the Trustees shall divide the trust as then constituted with any undistributed income therefrom into separate trusts, . . . one for each then living child of my son and one for then living descendants, collectively, of each deceased child of my son."

Thus, while Marshall is living, he is the sole income beneficiary of the trust.

[3] Paragraph 4.15 of the trust agreement provides in part:

> "A majority in interest of the [income beneficiaries] may remove a Trustee upon giving ten (10) days' written notice to such Trustee, fill such vacancy or any vacancy caused by the resignation of a Trustee and . . . may approve the accounts and give full release and discharge to any such removed or resigning Trustee which shall be binding upon all persons whomsoever with the same force and effect as though such accounts were approved by a court of competent jurisdiction. Each successor Trustee appointed hereunder must be a corporation situated in the continental United States of America and have capital of not less than ten million dollars."

Marshall Spiegel bases his claimed authority to remove trustees upon the fact that as sole income beneficiary he obviously possesses a majority in interest of the income beneficiaries.

We have found no evidence in the record that Spiegel's aunt resisted her removal as trustee. Further, Ill. Rev. Stat. Ch. 17, ¶1653(1) provides:

> "A person establishing a trust may specify in the trust instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act. [Trust and Trustees Act]"

(Footnote continued on following page)

to remove Continental. Continental contested Marshall's removal of it as a trustee, and refused to turn over the trust assets to the plaintiff pursuant to its interpretation of the trust agreement. They contended that the language of the trust required a qualified corporate trustee.[4] Spiegel filed a replevin action in the Circuit Court of Cook County requesting the court to order Continental to relinquish its custody of the trust assets. Continental responded with the filing of an interpleader action in the Cook County Circuit Court seeking a determination of whether the trust agreement required a corporate trustee. The two suits were consolidated in the Circuit Court and Spiegel filed a counterclaim in the consolidated action in the Circuit Court alleging that Continental had breached its fiduciary duty to him. The Circuit Court, after a hearing, ruled that the trust agreement not only required a corporate trustee, specified its duties and further ruled that Marshall Spiegel could not act as the sole trustee. The court went on to direct Continental to continue as cor-

[3] *continued*

Our research has failed to disclose any Illinois statute or decision which would preclude the person establishing a trust from investing the beneficiaries of the trust with the power to remove a trustee pursuant to the terms of the trust agreement or requiring that a beneficiary obtain court approval in order that he might remove a trustee. "The law appears firmly settled in Illinois that where a testator specifies in what manner a successor trustee is to be appointed, such a fiduciary can succeed to the trust in no other way." *DeKorwin v. First National Bank of Chicago*, 84 F.Supp. 918, 935 (N.D.Ill. 1949) "By so stipulating in the trust agreement, the settlor may reserve the power [to remove a trustee] to himself, or vest it in a beneficiary. . . ." Bogert, Trusts & Trustees §520(Rev. 2d.Ed.).

[4] Continental did not challenge Spiegel's authority to remove it as trustee, but contended that its removal could not be effective until such time as Spiegel had named a successor corporate trustee. In support of its position, Continental cited, *inter alia*, ¶4.19 of the trust agreement providing, "The corporate Trustee shall have custody of all investments and cash from time to time comprising the trust estate and may perform by itself all ministerial duties."

porate trustee until such time as Spiegel selected and a qualified successor corporate trustee agreed to assume the trustee's duties.[5] Spiegel appealed the decision of the Circuit Court to the Illinois Appellate Court, who affirmed, and the Illinois Supreme Court denied Spiegel leave to appeal. The record fails to reflect whether Spiegel's counterclaims alleging a breach of fiduciary duty have been adjudicated in the Illinois State Court to date.

Spiegel I

In June of 1983, while Spiegel's appeal was pending in the Illinois State Court system, he filed a complaint in the United States District Court for the Northern District of Illinois individually as a beneficiary of the Oscar Spiegel trust and also as trustee of the Oscar Spiegel trust, and as a "representative of a class of persons similarly situated." (*Spiegel I*) In this complaint (*Spiegel I*) Spiegel alleged that the defendants, Continental Illinois National Bank, Robert Paulsen, Samuel Hunt, Charles R. Hall, and Edward Bottum (Continental employees), had engaged in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) and were liable for treble damages under RICO. Spiegel's RICO claim alleged that Continental converted trust funds to its own benefit in failing to invest the trust income promptly (trust income was transferred to principal on a quarterly basis) and in using the trust income for Continental's benefit prior to transferring the trust income to principal. According to Spiegel, the quarterly financial statements Continental mailed to all trust beneficiaries were fraudulent in that they failed to disclose that Continental received profits from its use of the uninvested trust income. The plaintiff also alleged that when he inquired about Continental's policy regarding the investment of trust income, the defendant Robert Paulsen,

[5] The trust agreement limited Spiegel's selection of a successor corporate trustee to corporations located in the continental United States with at least ten million dollars of capital.

the Spiegel account executive and a trust officer at Continental, sent a letter to Spiegel dated June 10, 1982, in which he fraudulently misrepresented the applicable regulations of the Comptroller of the Currency and the laws of the State of Illinois in stating, "We have been prohibited from investing income cash by applicable law and regulation, unless it is first transferred to principal by terms of the trust document."

After the filing of *Spiegel I* in the U.S. District Court, the parties exchanged correspondence dealing with the pending state court litigation. At this time, while Spiegel's appeal was pending in the state court, Spiegel directed Continental to transfer the assets of the trust to the First National Bank of Highland Park ("Bank of Highland Park"), informing Continental that they would act as the qualified corporate successor trustee. Continental agreed to transfer the assets, petitioned the circuit court to be reimbursed from the trust assets for the attorneys' and trustee's fees incurred in litigating the question of the necessity of a corporate trustee. On June 29, 1983 the Cook County Circuit Court denied Continental's petition on the grounds that since the case was on appeal to the Illinois Appellate Court they had lost jurisdiction over the subject matter and were thus unable to decide the question of Continental's entitlement to attorneys' fees. On July 1, 1983, Continental deducted some $40,409.31 of the $61,138.58 it claimed in fees and expenses from the trust assets before the transfer to the Bank of Highland Park. An attorney for Continental, Scott Davis ("Davis"), sent a letter dated July 13, 1983, to Spiegel's lawyer discussing, *inter alia*, Continental's deduction of the $40,409.31 claimed as fees and expenses. The July 13 letter read in part:

> "You asked in your letter about the disposition of the Albuquerque, New Mexico municipal bond due on July 1, 1983. That maturing bond was collected on July 1, 1983 and the proceeds credited to the Trust's account. Continental will shortly send a check or (or checks) to [the Bank of Highland Park] and Marshall Spiegel for the Trust's cash as of the date

the check or checks are mailed. (If any dividends are collected on the Trust's securities (other than municipal bonds) prior to their reregistration and transfer, we will send those dividends as well. We will also send the amount collected for the coupon on the Oregon State bond.) However, much of the Trust's cash was used to pay some of Continental's attorneys' and trustees' fees and expenses. Continental will shortly send to Marshall Spiegel a final cash statement showing the amount so used.

We do not expect you to agree that this payment of fees and expenses was proper. On the other hand, we believe that Continental is (and will in the future be) entitled to receive from the Trust's assets substantially more than the amount already taken for fees and expenses. We intend to promptly file with the Chancery Court a petition covering fees and expenses. This is a matter that ultimately must be decided by [the Cook County Circuit Court]."

Two months later, on September 13, 1983, Davis sent another letter to Spiegel's counsel and William Eifrig, an officer of First National Bank of Highland Park that, in addition to discussing various matters regarding the transfer of the trust assets, restated Continental's position on fees:

"As noted in Continental's June 29, 1983 motion for approval of its account and for payment of fees and expenses and its Fee Petition of September 13, 1983, (copies of which are enclosed to Mr. Eifrig), the Trust owes Continental a substantial amount of attorneys' fees and expenses. As of June 6, 1983, the total amount of attorneys' and extraordinary trustees' fees and expenses incurred by Continental was $102,881.65; of this amount, Continental was entitled under Illinois law to receive immediately $61,138.58. On July 1, 1983, Continental deducted from the Trust's assets $40,409.31 for fees and expenses, which was substantially less than the $61,138.58 it was entitled to

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receive immediately as of June 6, 1983. These deductions were reflected in the cash statements sent by Robert Paulsen to Mr. Eifrig on July 19, 1983.

As the Fee Petition reflects, there has been extensive activity in the state and federal litigation since June 6, 1983. Continental has incurred additional attorneys' fees and expenses of $66,375.60 from my firm alone from the period from June 7, 1983 through August 18, 1983. Continental intends to use every means at its disposal to recover these amounts, as well as the unpaid amount of $62,472.34 that it previously incurred. The total amount of unpaid fees and expenses stands as of August 18, 1983 at $128,847.94.

For the reasons set forth in Continental's June 29 motion and September 13 Fee Petition, Continential is presently entitled to be reimbursed from the Trust for $53,917.07 in fees and expenses and is very likely to be entitled to the remaining $74,930.87 in unpaid fees and expenses at the close of the litigation between Marshall Spiegel and Continental. Continental demands that the $128,847.94 which it has incurred in fees and expenses and for which it has not been paid be deducted from the Trust's assets and placed in escrow within [the Bank of Highland Park] pending termination of the litigation.

Because of the high cost of the litigation, Continental further demands that [the Bank of Highland Park] maintain the non-real estate holdings of the Trust in a secure, liquid form in order to satisfy the ultimate amount of fees and expenses which the Trust will owe Continental when the litigation terminates. Given the manner in which Marshall Spiegel is conducting the litigation, it is very likely that all of the Trust's non-real estate assets will be consumed for such fees and expenses. Moreover, it would not be surprising if one or both parcels of the Trust's real estate had to be sold to satisfy fee bills if this litigation continues at the present pace. Continental holds [the

> Bank of Highland Park] responsible for insuring that the Trust's assets are available to pay Continental's fees and expenses. Continental will proceed against [the Bank of Highland Park] itself for these fees and expenses if the Trust's assets are not available. In light of these facts, it would be prudent for [the Bank of Highland Park] to refuse to permit substantial amounts of the Trust's assets to be placed into risky ventures or transferred away from [the Bank of Highland Park]." (footnotes omitted)

Continental filed a copy of this letter with the judge presiding over the state court litigation in the Cook County Circuit Court.

Continental moved to dismiss *Spiegel I* (then pending in the United States District Court) on the grounds that the court lacked subject matter jurisdiction[6] and that Spiegel failed to state a claim for relief under RICO. Spiegel argued to the district court that Davis' letters of July 13 and September 13 constituted two predicate acts of mail fraud in addition to the other acts of mail fraud alleged in his complaint (the mailing of the allegedly inaccurate quarterly financial statements and the June 10, 1982 Paulsen letter purportedly misrepresenting the Illinois laws and regulations of the Comptroller of the Currency applicable to the trust); the plaintiff claimed that the July 13 letter misrepresented the disposition of the proceeds of a municipal bond and that the September 13 letter urged that the Bank of Highland Park take an "improper action for the benefit of Continental." (We assume that the "improper action" Spiegel was referring to was Continental's request to the Bank of Highland Park to place $128,847.94 in escrow to reimburse Continental for incurred fees and expenses and to retain the remaining non-real estate assets in liquid form to pay future fees.) On January 5, 1984 the district court granted the defen-

[6] The record fails to disclose the grounds for Continental's assertion that the district court lacked subject matter jurisdiction.

dant's motion for summary judgment,[7] concluding that Spiegel's complaint had alleged but one predicate act of mail fraud—the June 10 Paulsen letter allegedly misrepresenting the laws and regulations applicable to the Spiegel trust. The court held that Spiegel failed to state a claim for relief under RICO as he failed to allege a pattern of racketeering activity as required and defined in 18 U.S.C. 1961(5).[8] With respect to the July 13 and September 13 Davis letters, the court stated, "Those statements are not alleged [in the complaint] and cannot form a basis for this action." The order accompanying the district court opinion recited merely, "defendants' motions to dismiss for want of subject matter jurisdiction are granted" because Spiegel had failed to allege two predicate acts of mail fraud and thus failed to state a claim under RICO.

Spiegel II

Spiegel chose not to appeal the court's decision in *Spiegel I*, but instead filed a new complaint in the federal court (*Spiegel II*) eight days after the district court's denial of Spiegel's motion to reconsider his dismissal of *Spiegel I*. *Spiegel v. Continental Illinois National Bank*, 609 F. Supp. 1083 (D.C. Ill. 1985) (*Spiegel II*). *Spiegel II* named as defendants the same party defendants named in *Spiegel I*, and once more alleged that the same party defendants had committed a RICO violation, and added three pendent state law claims alleging that Continental had breached its fiduciary duty to Spiegel. The only relevant difference

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[7] Both parties presented "matters outside of the pleadings in support of their respective positions" and the district court "treat[ed] defendant's 12(b)(6) motions as though they were brought pursuant to Rule 56 [summary judgment]."

[8] A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5).

between the RICO claims in *Spiegel I* and in *Spiegel II* is the added allegation in *Spiegel II* of two additional predicate acts of mail fraud (the July 13 and September 13 letters authored by Davis). Continental moved to dismiss *Spiegel II* on the grounds that it was barred under the doctrine of res judicata based on the dismissal of *Spiegel I*.

The district court recognized that because *Spiegel II* relied partially on acts that occurred after the filing of *Spiegel I* (the July 13 and September 13 letters), "the doctrine of *res judicata* does not bar *Spiegel II* to the extent that it is based on [those] acts which occurred after *Spiegel I* was filed." *Id.* at 1086. The court stated that except for the two newly-alleged acts of mail fraud, "*Spiegel II* is a reincarnation of *Spiegel I* and satisfies the three elements of *res judicata*." *Id.* Referring to the newly alleged predicate acts, the district court held that the July 13 and September 13 letters were not acts of mail fraud on the grounds that "Congress could not have intended that the mail fraud statute sweep up correspondence between attorneys, dealing at arm's length on behalf of their parties, concerning an issue in pending litigation, especially where the presiding judge is aware of the alleged scheme and will ultimately rule on the acts in question." *Id.* at 1089. As an alternate ground for its holding, the court held that the "scheme" alleged by Spiegel was not "fraudulent" in "any typical sense of the word," *id.* at 1088, and also held that the July 13 and September 13 letters "*increased* the possibility that the scheme—if unlawful—would be remedied, and thus . . . cannot as a matter of law be said to have furthered the scheme." *Id.* at 1090 (emphasis in original). In view of the court's ruling that Davis letters of July 13 and September 13 did not constitute acts of mail fraud, the court concluded that *Spiegel II* alleged only one predicate act of mail fraud (the June 10, 1982 Paulsen letter) and dismissed the remainder of Spiegel's RICO claim as barred under the doctrine of *res judicata*. Since the dismissal of the RICO claim eliminated the only basis for the district court's subject matter juris-

diction, the court also dismissed Spiegel's pendent state law claims. Spiegel appealed.

II

Before turning to the issues raised in this appeal, we outline the civil provisions of RICO. Section 1964(c) of Title 18, U.S.C., provides:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorneys' fee."

Section 1962 defines conduct prohibited under RICO, and for the present case, the most pertinent provision is § 1962(c):

> "It shall be unlawful for any person employed by or associated with the any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

"Racketeering activity" is defined in a list of various state and federal offenses, including mail fraud in violation of 18 U.S.C. § 1341. A "pattern of racketeering activity" is established with proof of the commission of at least two acts of racketeering activity (commonly referred to as predicate acts) within a ten-year period. 18 U.S.C. § 1961(5). Although Congress enacted RICO as a tool in the fight against organized crime, *see Schact v. Brown*, 711 F.2d 1343, 1357 (7th Cir.), *cert. denied*, 104 S.Ct. 508, 509 (1983), the broad language of the RICO statute resulted in plaintiffs seeking treble damages under RICO in civil commercial disputes that otherwise would only involve a breach of contract suit, or securities, or state law

fraud claims. *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 386-87 (7th Cir. 1984), *aff'd*, 105 S.Ct. 3291 (1985). In the present case (*Spiegel II*), Spiegel argues that the conduct of Continental constitutes a violation of RICO supporting an award of treble damages.

Res Judicata

Initially we address the issue of whether the district court's dismissal of *Spiegel I* bars Spiegel's present action (*Spiegel II*) under the doctrine of *res judicata*. Spiegel contends that the doctrine of *res judicata* should not be interpreted as a bar to his complaint in *Spiegel II*, arguing that the court dismissed *Spiegel I* only on the grounds of lack of subject matter jurisdiction and thus made no determination on the merits as is required for the application of the doctrine of *res judicata*.

"The law in this circuit is that *res judicata* applies when there is '(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits.' " *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, 852 (7th Cir. 1985) (quoting *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982)). With respect to the initial requirement that the final judgment in the previous action must have been on the merits, we note that "a judgment on the merits is one which 'is based upon legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form.' " *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 943 (7th Cir 1981) (quoting *Fairmont Aluminum Co. v. Comm'r*, 222 F.2d 627 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955)). Thus, "A dismissal for failure to state a claim upon which relief can be granted . . . is a dismissal on the merits and is *res judicata*," while "[a] dismissal for lack of subject matter jurisdiction is *not* on the merits and will not bar a later suit." *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1277 (7th Cir. 1983) (emphasis in original); *see also*

Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3 (1981). In *Spiegel I*, Continental's motion to dismiss relied upon both Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted). In discussing the procedural context of the case, the district court's opinion in *Spiegel I* recited, "Defendants' motions to dismiss are purportedly brought pursuant to Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim upon which relief can be granted under RICO)." The district judge, without any discussion of the subject matter jurisdiction over Spiegel's claims, but ruling exclusively on the factual allegations of Spiegel's complaint, held that "[s]ince the plaintiff has failed to allege two or more examples of racketeering activity, the plaintiff has *failed to state a claim under RICO*. Thus, defendants' motions for summary judgment as to the RICO count are granted." (emphasis added) Since "[a] dismissal for failure to state a claim upon which relief can be granted . . . is a dismissal on the merits," *Bunker Ramo*, 713 F.2d at 1277, we conclude that the district court opinion granting summary judgment because Spiegel failed to state a claim was a judgment "on the merits."[9]

It is undisputed that the parties named in *Spiegel II* are the same parties named in *Spiegel I* and thus satisfy the requirement that there be an identity of parties to invoke the doctrine of *res judicata*. The final requirement for the application of *res judicata* is that the two actions allege the same cause of action. This circuit has announced the following test for determining whether two suits are based on the same cause of action:

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[9] In addition, we note that the district court in *Spiegel I* treated the defendants' motion to dismiss as a motion for summary judgment. The only motion under Fed. R. Civ. P. 12(b) that can be considered as a motion for summary judgment is a motion pursuant to 12(b)(6), failure to state a claim upon which relief can be granted.

> "[A] cause of action consists of a single core of operative facts which give the plaintiff a right to seek redress for the wrong concerned. . . . If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted, and *res judicata* bars the later [action]."

Lee v. City of Peoria, 685 F.2d at 200 (quoting *Morris v. Union Oil Co. of California*, 96 Ill. App. 3d 148, 421 N.E.2d 278, 285 (1981)). In both *Spiegel I* and *Spiegel II*, the plaintiff alleged: (1) first that Continental failed to invest trust income promptly and second that Continental used the trust income for its exclusive benefit before timely investing the same; (2) that Continental failed to disclose the fact of its failure to properly invest trust assets in the quarterly financial statements sent to Spiegel; (3) that the defendant Paulsen mailed a letter to Spiegel containing misrepresentations concerning Continental's duty under applicable laws and regulations to reinvest trust income; and (4) that this conduct violated RICO. In *Spiegel II*, the plaintiff added two new allegations: (1) the July 13 letter from Davis to Spiegel's counsel; and (2) the September 13 letter to Spiegel's counsel and Eifrig. Thus, except for the July 13 and September 13 letters alleged in *Spiegel II*, all of the allegations recited in *Spiegel II* (the alleged wrongful conduct of the defendant, the alleged harm to Spiegel (Continental depriving him of interest on trust funds not timely transferred to principal) and the alleged acts of mail fraud (the allegedly inaccurate quarterly financial statements and the Paulsen letter)) are essentially identical to the allegations set forth in *Spiegel I*. If not for the newly alleged predicate acts of mail fraud (the July 13 and September 13 letters), *Spiegel II* would be barred in its entirety under the doctrine of *res judicata*. In view of the fact that the two newly-alleged predicate acts of mail fraud occurred after the filing of *Spiegel I*, we agree with the district court's ruling that "the doctrine of *res judicata* does not bar *Spiegel II* to

the extent it is based on acts which occurred after *Spiegel I* was filed." *Spiegel II*, 609 F.Supp. at 1086.

The July 13 and September 13 Letters

We now turn to the issue of whether the letters that Continental's attorney Scott Davis sent to Spiegel's counsel dated July 13, 1983 and September 13, 1983 were acts of mail fraud constituting a pattern of racketeering activity under RICO. The statute defining mail fraud, 18 U.S.C. §1341, states, *inter alia*:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office [is guilty of mail fraud]."

Thus, to prove mail fraud under RICO, the plaintiff must establish (1) that the defendant participated in a scheme to defraud; and (2) that the defendant caused the mail to be used in furtherance of the scheme. *United States v. Bonansinga*, 773 F.2d 166, 168 (7th Cir. 1985); *see also Pereira v. United States*, 347 U.S. 1, 8 (1954). "Congress has decided not to define 'scheme or artifice to defraud,' because the range of potential schemes is as broad as the criminal imagination." *Bonansinga*, 773 F.2d at 173. Although Congress did not specifically define the phrase "scheme to defraud," it need not have defined the phrase as its meaning is so evident. Courts have concluded that "[i]t is not necessary that the scheme be fraudulent on its face but the scheme must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979).

The plaintiff's complaint in *Spiegel II* alleges that the defendants engaged in a scheme intended to defraud the Oscar Spiegel Trust and Marshall Spiegel of a substantial portion of the corpus of the trust and trust income. Specifically, Spiegel alleged that the trust administered by Continental as trustee "would be charged excessively for the administration of the said trusts and/or the earnings would not be paid over to the trust." Spiegel also alleges that the trust income was placed "in non-interest bearing demand" accounts in Continental for periods up to and exceeding 90-days and that earnings from the non-interest bearing accounts were "expropriated and removed" by the defendants for the benefit of Continental.

Spiegel alleged that the defendants sent several mailings in furtherance of this purported fraudulent scheme. In particular, Spiegel cites the periodic financial operational statements mailed to Marshall Spiegel and other "beneficiaries trustee's" (sic) that allegedly failed to disclose that Continental had placed trust income in non-interest bearing accounts, invested the income for Continental's exclusive benefit, and failed to disclose the amount of cash balances left uninvested. Spiegel also alleged that the June 10 letter from the defendant Robert Paulsen to Spiegel misrepresented that the applicable laws and regulations governing the trust prohibited the investment of trust income unless first transferred to trust principal pursuant to the terms of the trust. Spiegel's complaint further alleged that a letter dated February 22, 1982 from Robert Paulsen to Spiegel recited, "I . . . enclose a copy of the Investment review dated 12-31-81 which lists all of the trust assets," while the enclosed Investment review allegedly failed to specify the correct cash balance (Spiegel asserted the correct cash balance was $1,116.91 rather than $861.93 reflected in the Investment review), concealed the total uninvested cash and security deposits, and failed to disclose Continental's earnings on funds rightfully belonging to the trust. The complaint alleged that the July 13, 1983 letter from Continental's attorney Davis to Spiegel's counsel misrepresented

that a municipal bond had been collected and credited to the trust account, when instead Continental allegedly embezzled the proceeds of the bond and also alleged that the September 13, 1983 letter from Davis to Spiegel's counsel and William Eifrig of the Bank of Highland Park misrepresented the law of Illinois (without specifying how), failed to disclose certain facts related to the state court litigation, and set forth Continental's claimed right to allegedly exaggerated sums for trust and legal services and expenses.

In *Spiegel I*, the district court concluded that the plaintiff's allegation that Continental failed to disclose the amount of profit earned and retained as a result of its policy of placing trust income in non-interest bearing accounts and crediting the income to the trust principle only on a quarterly basis failed to constitute a fraudulent scheme within the meaning of 18 U.S.C. §1341. Further, the court in *Spiegel I* concluded that Continental's alleged failure to list refundable security deposits (from tenants leasing trust property) as trust assets on trust financial statements was not fraudulent conduct. Since these claims have already been considered and rejected by the district court in *Spiegel I* and Spiegel chose not to appeal that decision, we are barred from further consideration of these issues under the doctrine of *res judicata*. We next address the issue of Spiegel's allegations of fraud regarding the letters of July 13 and September 13 that were not before the court in *Spiegel I*.

Spiegel alleged that the letter of September 13 furthered the fraudulent scheme set forth above, and specifically asserted without specifying in what manner the letter misrepresented the law of the State of Illinois. Speigel also alleged that the September 13 letter failed to disclose that Spiegel had attempted to terminate Continental as trustee in August, 1981, failed to disclose that Continental filed a petition for fees in the Cook County Circuit Court that was denied, and failed to disclose that Robert Paulsen had admitted in his deposition in the state court proceedings that the Continental trust department failed

to keep time records and thus could not accurately specify the amount of time spent on the Oscar Spiegel trust. Spiegel's complaint failed to explain how the September 13 letter misrepresented Illinois law nor are we able to ascertain from either his complaint or the September 13 letter the content of the purported misrepresentation. We note the only mention of Illinois law in the letter of September 13 is, "As of June 6, 1983 . . . Continental was entitled under Illinois law to receive immediately $61,138.58" as attorneys' and trustee's fees and expenses. We are at a loss to understand how this statement in Davis' letter to Spiegel's counsel stating that Continental believed it was entitled to receive compensation for the amount of time spent on legal matters, trust fees, and other incidental expenses incurred can be construed as a misrepresentation of Illinois law. Further, when the September 13 letter was written, Spiegel's counsel knew that Spiegel had attempted to remove Continental as trustee in 1981 since that fact was alleged in the *Speigel I* complaint. Spiegel's counsel presumably was also aware that the Circuit Court of Cook County had denied Continental's motion for fees on June 29, since his present counsel also represented him in the state court litigation, and his counsel also was aware of the content of Robert Paulsen's deposition testimony in the state court litigation since he handled the examination of Paulsen at the deposition. From the above-stated facts, it is evident that Speigel's counsel, who participated in all of the pre-trial and trial proceedings in the state court matters, had full knowledge of all the facts that Continental allegedly failed to disclose in the September 13 letter. We are unable to understand how Spiegel can allege a fraud based upon the alleged failure to disclose facts to an attorney who has been an active participant in the litigation from its inception and thus is fully aware of all of the facts.

The *Spiegel II* complaint also alleges that the September 13 letter was part of the overall fraudulent scheme to increase the amount of attorneys' and trustee's fees allegedly owed to Continental and thus deprive Spiegel of an

unspecified amount (interest) due from the Oscar Spiegel Trust. The plaintiff Spiegel alleged that this fraudulent scheme consisted of the filing of: 1) the suit in Cook County Circuit Court to determine whether the trust agreement mandated a qualified corporate successor trustee; 2) the appointment of a trustee to protect the interest of the plaintiff's unborn children in the state court litigation; 3) attempting to obtain a lien against the trust for "exaggerated sums for trust services, legal services and other expenses which had no relationship to" the state court litigation; and 4) the continuance of the concealment of the removal of $40,409.31 as fees and the continuing dissipation of trust assets. With respect to the July 13 letter, the complaint in *Spiegel II* alleged that the letter of July 13 falsely represented that an Albuquerque, New Mexico municipal bond in the amount of $25,000 was collected and credited to the trust account, claiming that the proceeds of the bond were instead embezzled by the defendants.

Continental commenced the interpleader suit in the state court to determine whether it was proper for Spiegel to act as sole trustee of the trust under the terms of the trust agreement or whether the trust agreement by its very terms required a qualified successor corporate trustee. After the Illinois courts determined that the very language of the trust agreement mandated that the trust have a qualified corporate trustee, Continental deducted $40,409.31 from the trust assets as they believed they were entitled to this amount as attorneys' fees and expenses incurred in litigating the question of whether the trust agreement required a corporate trustee, and promptly disclosed this deduction in the July 13 letter from Continental's counsel Scott Davis to Spiegel's counsel. The July 13 letter also recited that Continental was confident Spiegel would not agree with the bank's retention of $40,409.31 and acknowledged that the matter would ultimately have to be resolved by the judge in the pending state court litigation. The September 13 letter once again recited that Continental retained the sum of $40,409.31

as attorneys' fees, explained Continental's position concerning additional fees it claimed the trust owed to Continental, requested the Bank of Highland Park to place sufficient trust funds in escrow to cover the additional claimed fees pending termination of the state court litigation, and informed the state trial judge of the status of the fee dispute. With the case pending in the Cook County Circuit Court, the circuit court had ample opportunity to protect the plaintiff's interest in the trust assets and possessed the power to order Continental to return the funds it deducted (with interest, if necessary) if the state court were to find that Continental's claim for fees was unwarranted under Illinois law. Since the Cook County Circuit Court was in a position to resolve Continental's alleged fees due from the trust assets and because these two letters fully advised Spiegel's counsel of Continental's deduction of funds from the trust and clearly set forth its reasoning for deducting the funds, we conclude that Spiegel's allegation that this was a "scheme" to deprive Spiegel of trust assets is without merit. Moreover, Continental's alleged conduct did not involve any fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension, and therefore was not fraudulent.[10]

Furthermore, in establishing a RICO violation, the mailings alleged must be in furtherance of the purportedly fraudulent scheme. *Bonansinga*, 773 F.2d at 168. In

[10] Spiegel's complaint alleged that the July 13 letter misrepresented the disposition of an Albuquerque, New Mexico municipal bond "as the funds from this bond were embezzled by the defendants herein and not furnished to First National Bank of Highland Park." Davis' July 13 letter stated "much of the Trust's cash was used to pay some of Continental's attorneys' and trustees' fees and expenses. Continental will shortly send to Marshall Spiegel a final cash statement showing the amounts so used." Thus, rather than misrepresenting the disposition of the municipal bond, Continental fully informed Spiegel that some of the proceeds were applied to Continental's claimed fees.

United States v. Wormick, 709 F.2d 454, 462 (7th Cir. 1983), this court explained that:

> "Mailings are in furtherance of a scheme if they are incidental to an essential part of the scheme. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954). Under this definition, mailings made after the scheme has reached its fruition are not in furtherance of the scheme. *United States v. Maze*, 414 U.S. 395 (1974), nor are mailings which conflict with the purposes of the scheme and have little effect upon the scheme. *United States v. Staszcuk*, 502 F.2d 875 (7th Cir. 1974)."

709 F.2d at 462 (quoting *United States v. Rauhoff*, 525 F.2d 1170, 1176 (7th Cir. 1975)). This court recently held in *Bonansinga* that a mailing of a communication could not be considered as being in furtherance of a scheme and thus not an act of mail fraud when the communication placed the allegedly defrauded party on notice of the purported fraud, making it more likely that the defendants' scheme would be detected. 773 F.2d at 172. Similarly, in the case before us, Continental's letters to Spiegel of July 13 and September 13 placed him on notice of its deduction of fees from trust assets and its position regarding additional fees (indeed the September 13 letter placed the state court judge on notice of Continental's actions). Rather than further the alleged scheme, the letters of July 13 and September 13 counteracted the purposes of the purported "scheme" and made it more likely that the alleged "scheme" would be uncovered. We conclude, as did the *Bonansinga* court, that a letter alerting the plaintiff to the alleged scheme cannot and will not be considered in furtherance of the alleged scheme and thus does not constitute an act of mail fraud. Furthermore, the two letters from Continental's attorney were mailed after the $40,409.38 had been deducted as attorney's fees. Thus our conclusion that the alleged mailings were not in furtherance of the alleged scheme is buttressed by the fact that the mailings were sent after the alleged scheme had reached

its fruition. *See United States v. Wormick*, 709 F.2d at 462.[11]

Since the July 13 and September 13 letters fail to constitute acts of mail fraud, we hold that Spiegel's complaint in the present action fails to set forth a pattern of racketeering activity as required to state a claim for treble damages under RICO. Accordingly, we dismiss Spiegel's RICO claim, and since the RICO claim provided the only basis for federal jurisdiction, we also dismiss the pendent state law claims for lack of subject matter jurisdiction. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 716 (1966).

III

Continental has filed a motion for an award of double costs and damages on appeal, including the reasonable attorney's fees incurred in its defense of this appeal pursuant to Fed. R. App. P. 38, arguing that Spiegel's appeal is "utterly frivolous and has been brought out of sheer obstinacy to harass appellees." Rule 38 provides:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

"An appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit." *Indianapolis Colts v. Mayor and City Council of Baltimore*, 775 F.2d 177, 184 (7th Cir. 1985); *see also International Union of Bricklayers & Allied Craftsmen Local Union No. 20, AFL-CIO v. Jaska*, 752 F.2d 1401, 1406 (9th Cir. 1985). After reviewing the arguments advanced by the plaintiff-appellant, we conclude this appeal was

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[11] As we conclude that the July 13 and September 13 letters were not acts of mail fraud, we need not address the alternate grounds advanced by the district court that Congress did not intend the mail fraud statute to reach "correspondence between attorneys, dealing at arms length on behalf of their parties, concerning an issue in pending litigation." *Spiegel I*, 609 F.Supp. at 1089.

frivolous within the meaning of Rule 38 as the result of his appeal should have been obvious from the outset. Furthermore, we note that the appellant's brief failed to explain how the district court decision was in error. Specifically, Spiegel's brief neglected to even discuss the applicability of the doctrine of *res judicata* to *Spiegel II*. Spiegel's brief further failed to delineate how the July 13 and September 13 letters were fraudulent stating only that the letters "merely continued the scheme to defraud," without specifying the nature of the allegedly fraudulent scheme, and asserting in a conclusory fashion without any explanation or delineation that "[e]ach mailing is a separate act of mail fraud." Instead of presenting logical arguments for reversing the district court's dismissal of *Spiegel II*, Spiegel's brief digressed at great length concerning Continental's alleged breach of its fiduciary duty to Spiegel (an issue neither addressed by the district court nor before us on appeal). A brief such as Spiegel's that fails to clearly and cogently present arguments for overturning the district court decision is of little or no help to this court and causes us to doubt whether the appellant prosecuted the appeal with any reasonable expectation of altering the judgment of the district court. Indeed, in *Bugg v. International Union of Allied Industrial Workers of America, Local 507 AFL-CIO*, 674 F.2d 595 (7th Cir.), *cert. denied*, 459 U.S. 805 (1982), we concluded that an appeal was frivolous where the district court found the plaintiff's claims to be "entirely groundless," and on appeal the plaintiff "in a perfunctory brief . . . failed to present any arguable reason why the district court erred in its disposition. He basically restates arguments that the lower court properly rejected." *Id.* at 600; *see also Hilgeford v. Peoples Bank*, 776 F.2d 176, 179 (7th Cir. 1985) (An appeal was held to be frivolous when, *inter alia*, the appellants "failed to support their claim of jurisdiction by citing relevant authority or by refuting the district court's analysis.").

The court, in addition to finding an appeal frivolous, must also make a second determination regarding the im-

position of costs and attorneys' fees pursuant to Rule 38: Is the case an "appropriate one for the imposition of sanctions?" *Indianapolis Colts*, 775 F.2d at 184. In determining whether sanctions are appropriate, courts look for an "indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or out of sheer obstinacy." *Reid v. United States*, 715 F.2d 1148, 1155 (7th Cir. 1983). "The purpose of [Rule 38] is twofold. First, it operates to compensate winners of judgments in the district court for the expense and delay of defending against meritless arguments in the court of appeals. Second, it seeks to deter such appeals and thus to preserve the appellate court calendar for cases worthy of consideration." *Ruderer v. Fines*, 614 F.2d 1128, 1132 (7th Cir. 1980). In *Ruderer* we concluded that an award of damages was necessary "to curb the appellant's litigious proclivities." *Id.* at 1133. Similarly in this case, we view the appellant's conduct in pursuing this senseless litigation as an attempt to harass the defendants and we believe an award of double costs and attorneys' fees is proper.

IV

The decision of the district court is AFFIRMED and the defendants-appellees are awarded double costs and reasonable attorneys' fees on this appeal. The defendants-appellees shall file a statement as to their fees and costs on appeal within 15 days of the date of this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

MARSHALL SPIEGEL

Plaintiff-Appellant

No. 85-1871 *v.*

CONTINTENTAL ILLINOIS NATIONAL BANK,
ROBERT PAULSEN, SAMUEL HUNT,
CHARLES R. HALL, and EDWARD BOTTUM,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

[May 13, 1986]

JUDGMENT — ORAL ARGUMENT

HON. WILLIAM J. BAUER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JESSE E. ESCHBACH, Senior Circuit Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with double costs and reasonable attorneys' fees on appel awarded to defendants-appellees, in accordance with the opinion of this Court filed this date. Defendants-appellees shall file a statement as to their fees and costs on appeal within 15 days of the date of this Court's opinion.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

MARSHALL SPIEGEL

Plaintiff-Appellant

No. 85-1871 v.

CONTINTENTAL ILLINOIS NATIONAL BANK,
ROBERT PAULSEN, SAMUEL HUNT,
CHARLES R. HALL, and EDWARD BOTTUM,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

[June 11, 1986]

ORDER

HON. WILLIAM J. BAUER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JESSE E. ESCHBACH, Senior Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

MARSHALL SPIEGEL

Plaintiff-Appellant

No. 85-1871 *v.*

CONTINTENTAL ILLINOIS NATIONAL BANK,
ROBERT PAULSEN, SAMUEL HUNT,
CHARLES R. HALL, and EDWARD BOTTUM,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

[July 18, 1986]

ORDER

By the Court:

This matter comes before the Court for its consideration upon the following documents:

1. The "PLAINTIFF-APPELLANT'S RESPONSE TO STATEMENT OF FEES AND EXPENSES" filed herein on June 18, 1986.

2. The "PLAINTIFF-APPELLANT'S MOTION TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on June 16, 1986.

3. The "MOTION FOR LEAVE TO FILE REPLY TO APPELLANT'S RESPONSE TO STATEMENT OF FEES AND EXPENSES" filed herein on June 23, 1986.

4. "APPELLEE'S REPLY TO APPELLANT'S RESPONSE TO STATEMENT OF FEES AND EXPENSES" filed herein on June 23, 1986.

On consideration thereof,

IT IS ORDERED that the "MOTION FOR LEAVE TO FILE REPLY TO APPELLANT'S RESPONSE TO STATEMENT OF FEES AND EXPENSES" is GRANTED and the clerk of this court is directed to file instanter "APPELLEE'S REPLY TO APPELLANT'S RESPONSE TO STATEMENT OF FEES AND EXPENSES."

Appellant has filed his "RESPONSE TO STATEMENT OF FEES AND EXPENSES" contesting the award of attorneys' fees in the present case. Because this objection goes to the merits of our opinion, we will construe appellant's "RESPONSE TO STATEMENT OF FEES AND EXPENSES" as a petition for rehearing and consider it as such.

Since the appellate mandate will not issue until seven days after a petition for rehearing is decided, appellant's "MOTION TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI" is denied as unnecessary.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

MARSHALL SPIEGEL

Plaintiff-Appellant

No. 85-1871 *v.*

CONTINTENTAL ILLINOIS NATIONAL BANK,
ROBERT PAULSEN, SAMUEL HUNT,
CHARLES R. HALL, and EDWARD BOTTUM,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

[July 23, 1986]

ORDER

HON. JOHN L. COFFEY, Circuit Judge

This matter comes before the Court for its consideration upon the following documents:

1. The "VERIFIED BILL OF COSTS AND STATEMENT AS TO ATTORNEYS' FEES" filed herein on May 28, 1986.
2. The "PLAINTIFF-APPELLANT'S RESPONSE TO STATEMENT OF FEES AND EXPENSES" filed herein on June 18, 1986.
3. The "APPELLEES' REPLY TO APPELLANT'S RESPONSE TO STATEMENT OF FEES AND EXPENSES" filed herein on June 23, 1986.

4. The "PLAINTIFF-APPELLANT'S MOTION TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on June 16, 1986.

On July 18, 1986, we construed appellant's objections to attorneys' fees as a petition for rehearing. On June 11, 1986, we denied appellant's petition for rehearing which addressed the attorneys' fees issue. Accordingly,

IT IS ORDERED that the order of July 18, 1986, is hereby VACATED.

IT IS FURTHER ORDERED that the "PLAINTIFF-APPELLANT'S RESPONSE TO STATEMENT OF FEES AND EXPENSES" is DENIED and attorneys' fees are awarded in the amount of $30,518.51. The costs will be awarded when the mandate in this appeal issues.

IT IS ALSO FURTHER ORDERED that the "PLAINTIFF-APPELLANT'S MOTION TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI" is GRANTED and the mandate in this appeal is stayed to and including October 23, 1986.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

MARSHALL SPIEGEL

Plaintiff-Appellant

No. 85-1871 *v.*

CONTINTENTAL ILLINOIS NATIONAL BANK,
ROBERT PAULSEN, SAMUEL HUNT,
CHARLES R. HALL, and EDWARD BOTTUM,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

[August 26, 1986]

ORDER

HON. JOHN L. COFFEY, Circuit Judge

This matter comes before the Court for its consideration upon the "PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR RECONSIDERATION PURSUANT TO F.R.A.P. 27(C)" filed herein on August 1, 1986.

On consideration thereof,

IT IS ORDERED that said motion is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARSHALL SPIEGEL, Individually and
as a Representative of a Class of Persons
Similarly Situated

Plaintiff

No. 84 C 8255 *v.*

CONINTENTAL ILLINOIS NATIONAL BANK,
ROBERT PAULSEN, SAMUEL HUNT,
CHARLES R. HALL, and EDWARD BOTTUM,

Defendants.

Memorandum Opinion and Order
(April 16, 1985)

ASPEN, District Judge:

This is a "civil RICO" action,[1] filed under 18 U.S.C. §§ 1961 et seq. In brief, the complaint alleges that the defendants Continental Bank ("Continental") and several bank officials used a pattern of mail fraud to hide Continental's use of trust income for its own benefit. The plaintiff Marshall Spiegel ("Spiegel") is the sole income beneficiary of the "Oscar Spiegel Trust" ("the Trust"), and he has sued on behalf of a purported class of trust beneficiaries similarly defrauded by Continental. Continental moved to dismiss the case as barred by *res judicata*. In a minute order the Court previously reserved decision on the *res judicata* issue and

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1. "RICO" is the common acronym for the "Racketeering Influenced and Corrupt Organization Act," 18 U.S.C. §1961 *et seq.*

directed the parties to file supplemental memoranda about whether the complaint states a claim upon which relief can be granted. The parties have done so. For the reasons stated below, the Court grants Continental's motion to dismiss, basing the dismissal in part on the doctrine of *res judicata* and in part on Spiegel's failure to state a claim for relief under RICO.

I.

The following undisputed history is taken from the complaint and from the papers submitted by the parties.[2] In 1972 Spiegel's father Oscar created a trust which named Spiegel as sole income beneficiary. Continental and a private individual were named as Trustees. Spiegel was to become a trustee upon reaching age 25, which he did in 1981. During that year Spiegel stated that he wanted to act as sole trustee. Continental refused to yield its position as corporate trustee, citing a provision of the trust agreement requiring a corporate trustee.

This dispute spawned suits. In December 1981 Spiegel filed a replevin action against Continental in the Circuit Court of Cook County. Continental reacted by filing a suit in Circuit Court, seeking a declaration that the Trust Agreement required there to be a corporate trustee. The two suits were consolidated, and Spiegel counterclaimed, alleging various breaches of fiduciary duty by Continental. These alleged breaches of fiduciary duty overlap the allegations of fraud in

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2. Because we looked beyond the face of the complaint in deciding this motion, we convert it to one for summary judgment under Fed.R. Civ.P.56. *See* Fed.R.Civ.P. 12(b).

the case.

The Circuit Court upheld Continental's position that the Trust Agreement required a corporate trustee. Spiegel appealed, lost, and the Illinois Supreme Court denied him leave to appeal to that court. So far as we know, Spiegel's fiduciary duty counterclaims are still pending in state court.

On June 15, 1983, while the state court appeal was pending, Spiegel sued Continental in federal court (*"Spiegel I"*), basing jurisdiction on RICO. Like the complaint in this case (*"Spiegel II"*), the complaint there alleged that the defendants engaged in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). Spiegel's theory was that the trustees, in effect, converted trust funds for the benefit of Continental. They did this by transferring trust income to principal quarterly. During any given quarter, Continental would use this available income for its own benefit. Spiegel charges that this scheme to use such "float" money was not disclosed to him, and that when he later learned of it, defendants made misleading statements to cover up.[3]

Spiegel I was heard by Judge Roszkowski, who granted Continental's motion for summary judgment[4] on the basis that the complaint failed to state a claim for relief under RICO. Spiegel now concedes that Judge Roszkowski was right in that respect. *See* Spiegel's Response to Memorandum in Support of Motion to Dismiss at 4. In particular, the

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3. While the alleged scheme is more complex than indicated by this thumbnail sketch, additional elaboration is not needed for the purposes of this opinion.

4. Judge Roszkowski, like this Court, converted a motion to dismiss into one under Rule 56.

Court held that Spiegel had not alleged "a pattern of racketeering activity."[5] Spiegel's RICO claim was predictated solely on alleged violations of the federal mail fraud statute, 18 U.S.C. §1341. The Court found that Spiegel had not alleged two or more acts of mail fraud and thus had not satisfied RICO's requirement that a violation be based on at least two acts of racketeering activity within a ten-year period. *See* 18 U.S.C. §1961(5). The court assumed that a letter written by defendant Paulsen, concerning Continental's policy of reinvesting trust income quarterly, was a predicate act of mail fraud, but held that this act was the only one alleged.

After the *Spiegel I* complaint had been filed, counsel for both parties had exchanged correspondence relating to the state court suit, which we will detail later. Spiegel argued to Judge Roszkowski that two of the letters penned by Continental's counsel were predicate acts of mail fraud. The Court rejected these arguments because the statements were not alleged in the complaint. It added in *dictum* that false statements made between attorneys in the context of pending litigation fall outside the scope of the mail fraud statute. *Spiegel I*, slip op. at 11.

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5. RICO redresses injuries "to business or property," 18 U.S.C. § 1964(c), by reason of "a pattern of racketeering activity" conducted by "any enterprise." 18 U.S.C. § 1962. A "pattern of racketeering activity" means at least two acts of such activity within ten years. 18 U.S.C. § 1961(5). "Racketeering activity" includes several state law offenses, as well as several ones which fall under Title 18. Thus, in general, civil RICO actions must be predicated on two or more specific indictable offenses. *See generally Haroco v. American National Bank & Trust Co.* 747 F.2d 384, 386-87 (7th Cir.1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 902, 83 L.Ed.2d 917 (1985).

On September 13, 1984, the court in *Spiegel I* denied Spiegel's motion to reconsider the previous dismissal. Eight days later, Spiegel filed *Spiegel II*. The complaint essentially mirrors that of *Spiegel I*, except that it alleges two additional predicate acts of mail fraud—the two letters written by Continental's lawyer Scott Davis ("Davis"). Continental promptly moved to dismiss *Spiegel II*, claiming that it was *res judicata* in light of the recent dismissal of Spiegel I.

II.

Although this case does have an aura of *deja vu* about it, we cannot agree with Continental that the complaint on its face is barred by *res judicata*. *Res judicata*, or "claim preclusion," contains three elements: (1) the final judgment in the previous case must have been "on the merits"; (2) the parties or their privies to the two suits must be identical; (3) the causes of action in both suits must be identical. *See, e.g., Mandarino v. Pollard*, 718 F.2d 845, 849 (7th Cir.1983), cert. denied, ___ U.S. ___, 105 S.Ct. 116, 83 L.Ed.2d 59 (1984); *Green v. Illinois Dept. of Transportation*, 609 F.Supp. 1021, 1024 (N.D.Ill. 1985) (Aspen, J.). While the first and second elements were met in this case,[6] the third one

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6. Although the first suit was dismissed for failure to state a claim upon which relief could be granted, such dismissals are generally considered to be "on the merits" for res judicata purposes. *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n. 3, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103 (1981); *Cannon v. Loyola University*, 609 F.Supp. 1010, 1015-1016 (N.D.Ill. 1985) (Aspen, J.), generally 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 4439 (1981) at 354-62. Because Judge Roszkowski plainly addressed the merits of the *Speigel I* complaint, that dismissal could have *res judicata* effect under the first prong of the test. As for the second factor, the parties do not dispute that they were themselves in *Spiegel I*.

was not. action consists of a single core of operative facts which give[s] the plaintiff a right to seek redress for the wrong concerned.'" *Green*, 609 F.Supp. at 1024, *quoting Lee v. City of Peoria*, 685 F.2d 196, 200 (7th Cir.1982). *Res judicata* bars claims for relief which were actually raised in the first suit and also claims which could have been raised.*Id.*

The problem with Continental's *res judicata* defense is that *Spiegel II* is based on acts which occurred after *Spiegel I* was filed. These acts could not have been raised in the *Spiegel I* complaint, and indeed, Judge Roszkowski prevented Spiegel from relying on these acts in contesting the summary judgment motion. In *Green* we rejected a proposed rule of *res judicata* that would impose on a plaintiff a duty to amend a suit to include new causes of action as they accrue. 609 F.Supp. at 1025-1026. While Continental is correct that the Court of Claims imposes a duty to amend in cases before it,[7] we rejected that rule as unsound. *Id; see generally* 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, § 4409 (1981) at 76- 77. In sum, then, we believe that the doctrine of *res judicata* does not bar *Spiegel II* to the extent it is based on acts which occurred after *Spiegel I* was filed.

However, the only thing sparing *Spiegel II* from clutches of *res judicata* is the allegation of two new predicate acts of mail fraud. In all other relevant respects, *Spiegel II* is a reincarnation of *Spiegel I* and satisfies the three elements of *res judicata*. As noted earlier, Judge Roszkowski remarked in *dictum* that those two alleged predicate acts of mail fraud

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7. *See, e.g., Everett Plywood Corp. v. United States*, 512 F.2d 1082, 1087 (Ct.Cl.1975).

could not be the basis of a mail fraud violation and, it follows, a RICO claim. In light of that *strong dictum*, and of the fact that this suit survives only by virtue of those two alleged acts, we directed the parties to brief the issue. The parties agree that this issue is one of first impression. We conclude below that Judge Roszkowski was essentially right.

III.

Before discussing the two letters in issue, we need to describe the context in which the letters were written. In early 1983, after Spiegel had lost in Circuit Court, but while his appeal was still pending, he asked that Continental transfer the Trust assets to another corporate trustee, the First National Bank of Highland Park ("FNB"). Continental agreed to do so. However, Continental wanted to be reimbursed from the Trust's assets for attorneys' and trustees' fees spent in litigating the issue of whether the Trust Agreement required a corporate trustee. Continental believed that Illinois law entitled it to such reimbursement.[8] On June 29, 1983, it petitioned the Circuit Court to award it fees, but the court denied the petition, holding that it lacked jurisdiction during Spiegel's pending appeal.

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8. Continental relies on several Illinois Cases in support of its position. *See Hamilton v. Nielsen*, 678 F.2d 709, 714 (7th Cir.1982) (interpreting Illinois law); *Templeton v. Continental Illinois National Bank*, 429 F.Supp. 1294, 1303-04 (N.D. Ill.1977)(same); *Northern Trust Co. v. Continental Illinois Nat'l Bank*, 43 Ill.App.3d 169, 200-02, 1 Ill.Dec. 767, 356 N.E.2d 1049 (1976), *aff'd in relevant part*, 68 Ill.2d 502, 12 Ill.Dec.248, 369 N.E.2d 1262 (1977). We of course express no opinion on Continental's purported right to fees, but we do note that on the basis of these cases it at least appears to have a good faith basis for requesting those fees.

Continental resorted to a self-help remedy. It decided to deduct some $40,000 of its claimed $60,000 in fees and expenses from the Trust's assets just before transferring them to FNB. Continental's counsel Davis sent Spiegel's lawyer a letter dated July 13, 1983, which mostly discussed the mechanics of the transfer of assets. However, the letter also discussed the deduction of fees and expenses. In relevant part, Davis wrote:

> You asked in your letter about the deposition of the Albuquerque, New Mexico municipal bond due on July 1, 1983. That maturing bond was collected on July 1, 1983 and the proceeds credited to the Trust's account. Continental will shortly send a check (or checks) to FNB and Marshall Spiegel for the Trust's cash as of the date the check or checks are mailed. (If any dividends are collected on the Trust's securities (other than municipal bonds) prior to their reregistration and transfer, we will send the amount collected for the coupon on the Oregon State bond.) However, much of the Trust's cash was used to pay some of Continental's attorneys' and trustees' fees and expenses. Continental will shortly send to Marshall Spiegel a final cash statement showing the amount so used.
>
> We do not expect you to agree that this payment of fees and expenses was proper. On the other hand, we believe that Continental is (and will in the future be) entitled to receive from the Trust's assets substantially more than the amount already taken for fees and expenses. We intend to promptly file with the Chancery Court a petition covering fees and expenses. This is a matter that ultimately must be decided by Judge Holzer.

Exhibit 5 attached to Spiegel's Complaint at 2-3. Spiegel's complaint alleges that this deduction of fees and

the letter sent describing it amounted to a predicate act of mail fraud.[9] On September 13, 1983, after working out more of the mechanics of the transfer of the assets, Davis sent a letter to both Spiegel's counsel and William Eifrig, an officer at FNB. Again, the letter discussed a variety of mundane business matters, and then repeated Continental's position on fees:

> As noted in Continental's June 29, 1983 motion for approval of its account and for payment of fees and expenses and its Fee Petition of September 13, 1983, (copies of which are enclosed to Mr. Eifrig), the Trust owes Continental a substantial amount of attorneys' fees and expenses. As of June 6, 1983, the total amount of attorneys' and extraordinary trustees' fees and expenses incurred by Continental was $102,881.65; of this amount, Continental was entitled under Illinois law to receive immediately $61,138.58. On July 1, 1983, Continental deducted from the Trust's assets $40,409.31 for fees and expenses, which was substantially less than the $61,138.58 it was entitled to receive immediately as of June 6, 1983. These deductions were reflected in the cash statements sent by Robert Paulsen to Mr. Eifrig on

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9. Paragraph 9 of the Complaint alleges that the first three sentences of the July 13 letter excerpt were "not true as the funds from this bond were embezzled by the defendants herein and not furnished to [FNB]." This allegation certainly strains credulity, since the rest of the letter, which was not quoted in the complaint—clearly discloses that some of the funds were deducted. It is thus hard to see what is "untrue" or at all misleading about the first three sentences.

July 19, 1983.

As the Fee Petition reflects, there has been extensive activity in the state and federal litigation since June 6, 1983. Continental has incurred additional attorneys' fees and expenses of $66,375.60 from my firm alone for the period from June 7, 1983 through August 18, 1983. Continental intends to use every means at its disposal to recover these amounts, as well as the unpaid amount of $62,472.34 that it previously incurred. The total amount of unpaid fees and expenses stands as of August 18, 1983 at $128,847.94.

For the reasons set forth in Continental's June 29 motion and September 13 Fee Petition, Continental is presently entitled to be reimbursed from the Trust for $53,917.07 in fees and expenses and is very likely to be entitled to the remaining $74,930.87 in unpaid fees and expenses at the close of the litigation between Marshall Spiegel and Continental. Continental demands that the $128,847.94 which it has incurred in fees and expenses and for which it has not been paid be deducted from the Trust's assets and placed in escrow within FNB pending termination of the litigation.

Because of the high cost of the litigation, Continental further demands that FNB maintain the non- real estate holdings of the Trust in a secure, liquid form in order to satisfy the ultimate amount of fees and expenses which the Trust will owe to Continental when the litigation terminates. Given the manner in which Marshall Spiegel is conducting the litigation, it is very likely that all of the Trust's non-real estate assets will be consumed for such fees and expenses. Moreover, it would not be surprising if one or both parcels of the Trust's real estate had to be sold to

> satisfy fee bills if this litigation continues at the present pace. Continental holds FNB responsible for ensuring that the Trust's assets are available to pay Continental's fees and expenses. Continental will proceed against FNB itself for these fees and expenses if the Trust's assets are not available. In light of these facts, it would be prudent for FNB to refuse to permit substantial amounts of the Trust's assets to be placed into risky ventures or transferred away from FNB.

Exhibit 4 to Spiegel's Complaint at 2-3. A copy of this letter was sent to Circuit Judge Holzer, who was presiding over the state court case and fee dispute. Spiegel claims that this letter was another predicate act of mail fraud. The issue is whether these two letters are indeed predicate acts of mail fraud.

Judge Roszkowski had this to say in *dictum* about the issue:

> In view of the court, false statements made between attorneys in the context of pending litigation are outside the scope of the mail fraud statue. No fiduciary duty exists and the parties are dealing at arm's length. See, e.g., *Pit Pros, Inc. v. Wolf*, 554 F.Supp. 284 (N.D.Ill.1983) and *Salisbury v. Chapman*, 527 F.Supp.577 (N.D.Ill.1981). The appropriate remedy in such a case would be to lodge a complaint with the appropriate disciplinary body or apply to the court for assistance. A RICO action for treble damages is hardly an appropriate solution

Spiegel I, slip op. at 11. We agree in general with this statement, although—because it was briefly made in a passing *dictum*—it needs some elaboration and refinement. The mail fraud statue punishes schemes to defraud where the

mails were used to further the schemes. See, e.g. *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954). It is not clear to us what "scheme" Spiegel is alleging was furthered by the two letters at issue. It appears (so we will assume) that the "scheme" was one to embezzle thousands of dollars of trust assets under the guise of claiming it as attorneys' fees.[10] We do not think the mail fraud statue was intended to embrace this purported scheme.

First of all, we find it hard to fathom exactly how the scheme was "fraudulent" in any typical sense of the word. As Spiegel notes in his memorandum, fraudulent schemes typically involve covering up illicit acts through false pretenses, failing to disclose material facts when there is some duty to do so, making false statements or ones with reckless disregard to their truth. *See, e.g., United States v. Bush*, 522 F.2d 641, 646 (7th Cir. 1975). As we read the letters in the context of the record before us, we find that Continental's lawyer twice wrote Spiegel's lawyer asserting Continental's purported right to fees concerning a pending case between the parties. So far as we can tell, no lies were told and nothing was hidden.[11] Indeed a copy of the second

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10. The Complaint also implies that the scheme was fraudulent in that the amount claimed for fees is allegedly exaggerated and unwarranted. *See* Paragraph 8(c).

11. The complaint does allege several material non- disclosures concerning the September 13 letter. *See* Paragraph 7. Even if these "non-disclosures" were somehow material, they were "omitted" from a letter for one attorney to opposing counsel in the context of adversarial litigation. Several of the "omissions" were obviously already known to opposing counsel. As for any others, we see no duty to disclose such facts given the context of opposing attorneys dealing at arm's

letter was sent to the judge presiding over the pending litigation, and the first letter invited confrontation on the issues: "We do not expect you to agree that this payment of fees and expenses were proper . . . We intend to promptly file with the Chancery Court a petition covering fees and expenses. This is a matter that ultimately must be decided by Judge Holzer." The impropriety, if any, was the act itself of deducting the fees from the trust assets. But this was fully and promptly disclosed to Spiegel's lawyer and to the judge. If this act of self-help was improper or unlawful, the court in that case had power to order repayment of the fees and possible sanctions on counsel. Even assuming the act was improper, it was not, we believe, a violation of the mail fraud statute. Congress could not have intended that the mail fraud statue sweep up correspondence between attorneys, dealing at arm's length on behalf of their parties, concerning an issue in pending litigation, especially where the presiding judge is aware of the alleged scheme and will ultimately rule on the acts in question.

Although this is a case of first impression, several cases and established principles bolster our holding. Fraudulent schemes which might arguably fall within the language of the mail fraud statute are still outside of its embrace if Congress did not intend that the statute apply to such schemes. *See United States v. Boffa*, 688 F.2d 919, 929 (3rd Cir.1982) (scheme to defraud employees of National Labor Relation Act not within mail fraud statute where Congress intended NLRA to be exclusive), *cert. denied*, 460 U.S. 1022

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length. Spiegel has failed to show that Continental's counsel had any fiduciary or other duty to disclose those facts in that context.

103 S.Ct. 1272, 75 L.Ed.2d 494 (1983). Subjecting the letters in issue to the mail fraud statute would chill an attorney's efforts and duty to represent his or her client in the course of pending litigation. It also would, as it did here, give birth to collateral suits. Where, as here, the court in the first, pending case can fully protect the rights of the parties from abuse or unethical conduct, we see no reason to torture the limits of the mail fraud statute to allow such collateral suits. We do not think Congress intended such a result where alternate remedies exist. *Cf. United States v. Gallant,* 570 F.Supp. 303,309-10 (S.D.N.Y. 1983) (scheme to sell bootleg records through mails not within mail fraud act where, *inter alia,* copyright laws adequately deal with offense). Finally, such a collateral suit would require this Court to tough upon issues which are pending already in the state court suit. We think that concerns of comity counsel against reading the mail fraud statute broadly to cover this context. *Cf. Colorado River Water Conserv. Dist. v. United States,* 424 U.S. 800, 817-19, 96 S.Ct. 1236, 1246-47, 47 L.Ed.2d 483 (1976) (abstention due to pending state litigation). This was simply a case of lawyers aggressively pursuing their client's interests in pending litigation, and fully disclosing to their adversaries and the Court what they had done. We express no opinion on the propriety of deducting attorneys' fees from the trust corpus. Even if this act can be viewed as "pulling a fast one," it is not the proper subject of a collateral RICO suit in federal court predicated on an extremely broad reading of the mail fraud act.

Spiegel's contentions to the contrary, that the parts of the letters he objects to were not written in the context of pending litigation, are unpersuasive. We also find his reliance on *Schact v. Brown,* 711 F.2d 1343 (7th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 508, 78 L.Ed. 2d 698 (1983), misplaced. Schacht involved a RICO claim against, among

others, accountants who allegedly played an active part of the fraudulent scheme. Here the attorneys are principals in the scheme. More importantly, it is significant (as we have emphasized) that the attorneys wrote the letters in the context of pending litigation. Policy reasons, including protecting the attorney-client relationship, preventing collateral litigation, and respecting concerns of comity, led us to find that these letters fell outside of the mail fraud statute. Simply "professionals," as "professionals," as Spiegel does, does not prove that *Schact* is controlling or even relevant.

This is not to say that if a client somehow induced an unwary lawyer to write a letter which furthered a fraudulent scheme that the client would necessarily escape the mail fraud statute. Nor should our opinion be read to immunize lawyers who are principals in a fraudulent scheme. But this is not such a case. Moreover, we are aware of and agree with cases which have read RICO broadly to encompass many varieties of unscrupulous conduct. *See Haroco v. American National Bank & Trust Co.*, 747 F.2d 384 (7th Cir.1984) (RICO does not require allegation of "racketeering injury"), cert. granted, ___ U.S. ___, 105 S.Ct. 902, 83 L.Ed.2d 917 (1985); *Schact v. Brown*, 711 F.2d at 1353-56 (RICO may embrace "ordinary" business frauds). But RICO still must be predicated on, in this context, two or more mail fraud violations. And the mail fraud statute, while also broad, does not extend to this case.

Even if the mail fraud statute could somehow be stretched to cover this case, we think that no claim for relief has been stated since the mailings could not have "furthered" the scheme. When the July 13, 1983 letter had been sent, Continental had already deducted the fees, and the letter simply *disclosed* the *fait accompli*. Where a mailing is made after a scheme has reached its fruition, it does not "further" the scheme and cannot support a mail fraud conviction. *See*

United States v. Maze, 414 U.S. 395, 401-02, 94 S.Ct. 645, 649, 38 L.Ed.2d 603 (1974); *United States v. Ledesma*, 632 F.2d 670, 677-78 (7th Cir.), *cert. denied*, 449 U.S. 998, 101 S.Ct. 539, 66 L.Ed.2d 296 (1980). It is true that mailings "made to promote the scheme," or "which relate to the acceptance of the proceeds of the scheme," or "which facilitate concealment of the scheme" are exceptions to this rule. *See Ledesma*, 632 F.2d at 677-78 n.11. But this case does not fall within any of these exceptions. Indeed, far from "concealing the scheme" the two letters fully disclosed the already accomplished "scheme," one of them disclosing it to a judge. The mailings did not lull Spiegel (or counsel) into false security, cause delay or otherwise further the scheme; rather, the disclosure increased the possibility that the scheme—if unlawful—would be remedied, and thus it cannot as a matter of law be said to have furthered the scheme. *See Maze*, 414 U.S. at 403, 94 S.Ct. at 650. In sum, then, we conclude that the two letters fall outside the scope of the mail fraud statute.[12] We are thus, as Judge Roszkowski was, left with one alleged predicate act of mail fraud. The rest of the RICO claim must be dismissed as barred by *res judicata*, since it is Spiegel I revisited. Because the RICO claim was the only federal claim in the suit, our pendent jurisdiction over the state law claims is dissolved, and the complaint as a whole must be dismissed. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 716, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). It is so ordered.

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12. In light of our holding, we need not decide whether there is a genuine issue of fact about whether the letters were mailed.